Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 188.

ADOLPHUS F. LIPPHARD ET AL., APPELLANTS,

vs.

IDA P. HUMPHREY ET AL., APPELLEES.

BRIEF FOR APPELLEES.

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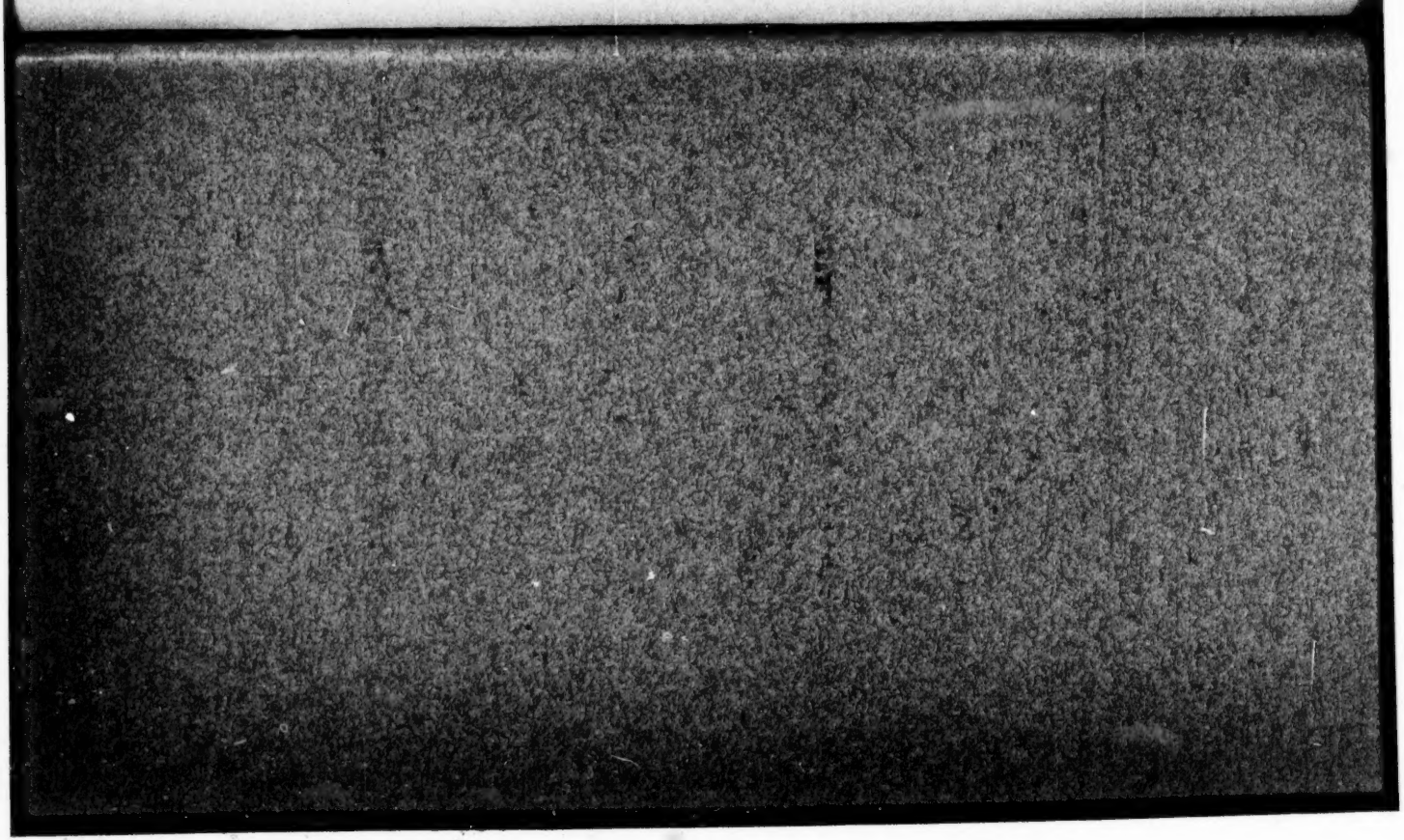

(20,509.)

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Statement of the Case.

On December 9, 1903, one Loraine Lipphard, for many years a resident of the District of Columbia, died. She left a paper writing purporting to be her last will and testament bearing date April 27, 1898. The Rev. Chastain C. Meador, since deceased, was named as the executor in the said will, and it was attested by three witnesses (Rec., pp. 1 and 2).

Decedent left surviving her as her next of kin and sole heirs at law her husband, Adolphus F. Lipphard, Sr. three sons, named John, William A., and Adolphus F. Lipphard, Jr., two daughters, named Sophia L. Hellen, nee Lipphard, and Capitola Lipphard Anderson, nee Lipphard, three grandchildren by Mary Lipphard Pyle, a deceased daughter, and nine grandchildren by Alice Lipphard Anderson, nee Lipphard, another deceased daughter. Four of said grandchildren, namely, Alice, Ida,

Capitola, and Helen Anderson were infants under the age of 21 years. All the other of her heirs and next of kin were of lawful age.

Decedent's property consisted of a small quantity of personal property valued at $350, and some real estate situated in this jurisdiction valued at $10,000 (Rec., pp. 1, 2, 3, and 4).

The husband, Adolphus F. Lipphard, Sr., and two of the sons, William A. and Adolphus F. Lipphard, Jr., filed a caveat to the probate of said will. All of the next of kin and heirs at law of decedent other than the caveators and John F. Lipphard, and the minor grandchildren, and one feeble-minded grandchild living in Philadelphia, waived citation and consented to the probate of the will (Rec., p. 5). Before the issues were framed on said caveat the Rev. Chastain C. Meador, the executor, under said writing, departed this life. Thereupon decedent's daughters, the said Capitola L. Anderson and Sophia L. Hellen, beneficiaries under said writing, petitioned the court for leave to propound said paper writing as and for the last will of decedent, and an order was passed by the court below authorizing this to be done (Rec., pp. 13, 14, and 15). Thereafter a decree was passed framing issues upon said caveat to be tried by a jury of said court. Said issues were five in number and were as follows:

1. Was the paper writing dated April 27, 1898, the last will and testament of said Loraine Lipphard?

2. Was the said writing executed and attested in due form, as required by law?

3. At the time of the execution of said paper writing, was the said Loraine Lipphard of sound and disposing mind and capable of making a valid deed or contract?

4. Was said writing procured by fraud or undue influence, practiced upon her by any person or persons?

5. Was the signature of the said Loraine Lipphard pro-

cured by force exercised upon her by any person or persons?

Thereafter Justice Stafford, holding the court below, apparently out of abundant caution, appointed Delmas C. Stutler, Esq., a member of this bar, guardian ad litem of the minor infants interested in decedent's estate to appear at the trial of the issues in said case (Rec., pp. 16 and 17).

The said Stutler filed a caveat on behalf of said infants (Rec., pp. 17, 18, and 19) and the same issues were sent to the jury as in the previous caveat (Rec., p. 20).

Justice Barnard presided at the trial of the issues in the court below and directed the jury to find the third, fourth, and fifth issues in favor of the caveatees, on the ground that the evidence adduced at said trial in support of said issues was insufficient to warrant the jury in finding a verdict in favor of the caveators thereon. The first and second issues were submitted to the jury with instructions by the court, who found said issues in favor of the will, and said will was by decree of the Supreme Court of the District of Columbia, sitting as a probate court, on the 3d day of May, 1906, admitted to probate and record. From this decree caveators appealed to the Court of Appeals of the District of Columbia, which affirmed the decree of the lower court, and from the decision of the Court of Appeals appellants took an appeal and sued out a writ of error to this court.

Before the trial of this case in the court below, John F. Lipphard, one of the testatrix's sons, conveyed, for the sum of $500, all of his interest in decedent's estate to his brother, William A. Lipphard, and died before the case came on for trial.

The paper writing in controversy was witnessed by three creditable witnesses, all of whom testified as witnesses for the caveatees. From their testimony it appears that on the 27th day of April, 1898, Mrs. Loraine

Lipphard came alone with the said paper writing to the office of C. H. Parker, a real estate broker, whose office is on Four-and-a-half street southwest, in this city; that she there found Miss Eva J. Parker, a daughter of Mr. Parker, and a clerk in his office, with whom she had long been acquainted. She produced said paper writing, told Miss Parker that it was her will, and that she wanted three witnesses to sign it. That two other witnesses were procured, and that all three being present in Mr. Parker's office, testatrix declared said paper writing to be her will, and made her mark thereto, in the presence of all the said witnesses, and they signed their names thereto as attesting witnesses, in her presence. That testatrix was, at the time, of sound mind, and capable of making a valid deed or contract. Witnesses did not recollect who signed Mrs. Lipphard's name to said paper, or whether said name was written while witnesses were present or not; but they testified that Mrs. Lipphard herself made her "cross" between her Christian and surname. The will was not read in the presence of said witnesses. After the said testatrix had subscribed her "cross-mark," and the will had been witnessed, it was handed to testatrix, who took it away with her (Rec., pp. 24, 25, and 26).

After the death of Mrs. Lipphard, the will was produced by Rev. C. C. Meador, the executor thereof and it was by him given to C. Clinton James, Esq., who lodged it in the office of the register of wills. The Rev. C. C. Meador had been decedent's pastor for more than forty years (Rec., p. 33).

From the testimony produced in said case by the caveators it appeared that the testatrix was a licensed midwife and had a great number of cases, but that she could not read or write; that the title to the real estate devised by said will was originally in Adolphus F. Lipphard, decedent's husband; that in March, 1857, he put a

ust upon said property, and it was subsequently sold
ereunder. He afterward took title again to the prop-
ty, and again it was sold. The title was then taken in
e wife's name. The money to pay for the same was
orrowed from a building association. Decedent was an
ergetic woman and a good wife. Part of the property,
hen purchased, was vacant land. In 1894 this land was
nproved by two houses. Testatrix made the contract
r the erection of said houses and attended to the build-
g of the same. Decedent's husband, by his own evi-
ence, is shown to be improvident and incapable of hold-
g property. Testatrix put all her property in trust and
rects that he shall have the beneficial enjoyment of it
uring his life, and that upon his death the expenses of
s last illness and funeral expenses shall be paid out of
er estate. Her personal estate was of little value. Her
al estate consisted of three houses. One of these she
ves to each of her two daughters; the other she directs
be sold by the trustee under her will and the pro-
eds to be equally divided among her three sons (Rec.,
p. 1 and 2).

The above is the substance of the facts established by
e evidence so far as is material to a discussion of the
ssignment of errors in appellant's brief.

Appellant discusses the five assignments of error in his
rief under two general heads :

First. That the court erred in submitting the first and
econd issues to the jury ; that the evidence was insuffi-
ent to support a verdict sustaining the will, on the
round that the jury ought not to be allowed to presume
om the evidence produced before them that the testa-
ix had knowledge of the contents of the will.

Second. In excluding evidence offered by the caveа-
rs of statements made by testatrix prior and subse-
uent to the date of her will as to how she intended to
ispose of her property. Of these in their order:

ARGUMENT.

First: The evidence shows that testatrix could not read. It further appears from the evidence that the will was not read to her at the time of its execution. Appellant seeks to maintain that from these two facts that the law raises the presumption that she did not know the contents of the will when she executed it. It is respectfully submitted that such is not law.

It is not shown by whom the will was prepared. The testatrix brought it with her to the office of one of the attesting witnesses for the purpose of execution. After its execution she took it away with her, and at her death it appears in the hands of Rev. C. C. Meador, the executor of the will, by whom it was propounded for probate and record. The executor died before the case was tried in the Supreme Court of the District of Columbia, and no explanation appears in the record as to how it came into his possession.

From the text of the will, it is evident that it was prepared by some one who had some knowledge of the law and of its requirements in the execution of wills. This is shown by the terms of the trust created by the will, the words of limitation employed therein, and the formal and usual attesting clause at its close. The will was in Mrs. Lipphard's possession before its execution, and she had ample opportunity to know its contents; she declared it was her will. Its provisions are such as she would naturally embody in a testamentary disposition of her property. It made provision for her husband and all of her children. She is shown to be a woman of intelligence and business capacity, although without the knowledge of the schools. There is no suggestion of fraud or undue influence in the case. She was in bodily and mental health and vigor when the instrument was executed. The jury found, as a matter of fact, that she did know the contents of the will at the time of its

execution. Did the court err in submitting the question to them?

The authorities are, that in the absence of fraud or undue influence, the illiterate maker of a will knows its contents. Affirmative proof of such knowledge, where the will is properly signed and executed, is not required. In the case of Vernon *vs.* Kirk, 30 Pa. St., 224, the testator could neither read nor write; the will was signed "E. N. for R. D.;" held to be a sufficient execution.

Said the court, in the course of its opinion:

> "When the execution had been proved, *the law raised the presumption affirmatively that she knew the contents.* The presumption is drawn from the ordinary conduct of mankind. Men do not commonly sign papers without knowledge of what is embraced within them; and this is true alike of *those who can read, and of those who can not.* Where fraud is practiced, or undue influence is *charged and proved*, affirmative proof of knowledge of the contents of a paper set up as a will may be necessary, but in no other case. The attempt of the plaintiff in error is to reverse this rule and change the burden of proof. Without giving any evidence of fraud practiced, or undue influence, she asks that the jury may be so instructed that they may find fraud and imposition, merely from the absence of proof that the paper was read to the testatrix—she having been unable to read. This can not be permitted. The cases in which affirmative proof of knowledge of contents has been held essential, after the execution of the paper has been shown, are, almost without exception, those in which such proof has been needed as an answer to a charge of imposition upon a testator. See Lewis *vs.* Lewis, 6 S. and R., 496. Here the court below, *instead of relying, as they might have done, upon the legal presumption which arose from proof of execution, submitted the matter to the jury*, with instructions that unless Rachel Dougherty did know

> the contents of the paper, and unless all its dispositions were hers, the whole instrument was void, and would not be her will. No more should have been asked, and no more could have been granted."

This case is on all fours with the one at bar.

In the case of King *vs.* Kinsey, 74 N. C., 261, the court said:

> "It is not necessary to the valid execution of the will of an illiterate person that the same shall be read over to him in the presence of the attesting witnesses. Upon proof of the actual execution the law presumes knowledge of the contents, and the onus of proving to the contrary falls upon the party alleging ignorance thereof."

In the case of Hoshauer *vs.* Hoshauer, 26 Pa. St., 404, it appeared that the testator did not understand English, and it was shown that the will was not read to him in the presence of the witnesses at the time of its execution. It was objected that there was no sufficient evidence to go to the jury to show that the testator knew the contents of the will. The court held that the presumption was the other way, and in the course of its opinion said:

> "If we had the whole transaction of the preparation and execution of the will before us in the evidence, and it then appeared doubtful whether it was read to him or not, this would be a different case. We must admit the presumptions that arise from the ordinary course of doing such business, and one of them is that a person signing any instrument and asking persons to attest it has taken care to understand its contents. His signing shows that he is giving expression to some purpose of his mind, and we must presume that he *knew that the writing contains that expression.* In executing wills and other instruments the witnesses seldom hear them read, because it is desired to save them this trouble or not to make the

> transaction unnecessarily public. When business is done in this ordinary way we must presume that no fraud or imposition has been practiced. *The evidence having shown that the will was executed according to the forms of law and without any fraud, it was right for the court to say 'there seems to be nothing in the way of a recovery by the plaintiff, and the verdict will be so taken,' because any other verdict would have been absurd, and counsel could not ask any other.*"

The facts in the case of Guthrie *vs.* Price was identical with those of the case at bar. In that case testatrix's name was subscribed to the will and between her Christian and surname was her mark in the form of a cross. The attesting witnesses signed the will at her request, in her presence, and in the presence of each other. She produced the paper writing for them to attest and declared that it was her will, and that she desired them to witness it as such. She did not write her name, but made her mark to the paper. It was not shown who did write her name to the will. It was not written by either of the witnesses nor in their presence. Testatrix could not read and the will was not read to her in the presence of or to the knowledge of the witnesses. The trial court instructed the jury, in effect, that notwithstanding the will was executed in accordanee with the formalities prescribed by the statute, *yet it being shown that the testatrix could not read the will was invalid, unless it was proven that it was read to her and that she was informed as to its contents.* After a careful review of the authorities, some of which are cited in appellant's brief, the Supreme Court of Arkansas held such instruction to be erroneous. Chief Justice English, in the concluding part of his opinion in this case, says:

> "It was proven that she could not read, and it was not shown that the will was read to her at the time it was executed, *but it may have been before.*

> She produced the will herself, declared it to be her will, asked the witnesses to attest it as such, and signed it by her mark. She was a woman of good sense, particular about her business transactions, and manifested her usual soundness of mind at the time. It is not shown that she was laboring under any feebleness of mind from disease or approaching dissolution. The provisions of her will appear to be reasonable. *It was erroneous for the court to tell the jury as a matter of law that it being shown that she could not read, it was necessary to prove that the will was read to her.* They had the right to infer from all the circumstances that she knew the contents of the will, though, as shown by the authorities above quoted, in *determining whether there was fraud or imposition in the execution of the will*, the fact that she could not read, and that the will was not read to her at the time she signed it, were circumstances to be considered by the jury" (23 Ark., 407).

In the case of Boyd *vs.* Cook, 3 Leigh., 32, a distinction was made by the court between the execution of a will *by a blind and illiterate person*, the court holding that in the case of a man who could see the signing of his will in the presence of witnesses, or acknowledging to them to be his will as signed, is proof that he was acquainted with its contents, but in the case of a blind man, although the formalities of the statutes be complied with, the jury or a probate court will, to rebut any imputation of fraud, require stronger evidence than the mere attestation of the signature, and this distinction seems to be well founded, for certainly a person in possession of all their natural faculties is better able to protect himself and less liable to imposition and overreaching than is a person who is deprived of his sight.

The facts in the case of Shanks *vs.* Christopher, 3 A. K. Marsh., 144, were identical with those of Guthrie *vs.* Price, and of the case at bar, with the single exception

that evidence was introduced showing that testator had made repeated statements declaring her purpose to dispose of her property as it was disposed of by his will. The court held that the execution of it by the testator with the solemnities required by the statute did of itself create a presumption of the knowledge of its contents, and that they conformed to his intention. That it was incumbent upon those who seek to avoid a will on the ground that it contains a disposition of the testator's estate of which he had no knowledge, to establish that fact by proof aliunde of the instrument.

One of the issues in the case of Pettes *vs.* Bingham, 10 N. H., 514, was as to whether or not the testator had knowledge of the contents of the will which he signed by mark, and the jury found that there was no evidence to show that he did not have knowledge. The court held that the presumption must be that the testator had knowledge of the contents of the will and that the will was entitled to probate and record.

In the case of Clifton *vs.* Murray, 7 Ga., 565, the will in controversy was that of a person old, infirm, and blind. It was not read by the testator at the time of its execution. The court held that the question after all was one of fraud, and that the question whether or not the testator had been imposed upon was one of fact to be left to the jury, and the circumstance of the will not having been read at the time of its execution should be weighed by the jury in considering their verdict. Judge Lampton, speaking for the court, said:

> "This case is narrowed down to a single point. When a testator is blind, or so illiterate as not to be able to read or write, is it indispensable to the validity of his will, that it be read to him, at the time of its execution, in the presence of the subscribing witnesses?
>
> "Swinburne intimates that it is He says that 'a blind man may make his testament in writing, provided the same be read over before witnesses, and

in their presence acknowledged by the testator for his will.'

"This may be the rule of the civil law; it would seem, however, never to have been adopted as that of the common law. For Lord Coke says: 'If the party who should deliver a deed, doth not require it to be read, he shall be bound by it, though he be blind or illiterate.' Thoroughgood's Cases, 2 Rep., 9; Shulter's Case, 12 Rep., 90. And Lord Coke goes so far as to hold that the deed is good, not only where it is presumed that it was read from the contrary not appearing, *but that it is good where the contrary doth actually appear. And there is, we apprehend, no distinction between wills and deeds in this particular.* It is, after all, *an issue of fraud, and the question as to whether or not the testator has been imposed on is one of fact to be left to the jury.* Now, it is admitted that the testator was sane, and it is not for us to conjecture how or in what manner he came to the possession of this knowledge. At any rate this evidence was most properly left to the jury, and they having found affirmatively, would the court be warranted in setting aside the verdict."

The judgment of the lower court admitting the will to probate and record was affirmed.

The case of Harrison *vs.* Rowan is to the same effect. The will in controversy in this case was assailed on the ground of fraud and want of testamentary capacity, and because the will was not read to the testator in the presence of the attesting witnesses. The court held that it was not necessary that the will should be read to the testator in the presence of the attesting witnesses, and said:

"It would be an unwise provision of the law to require this to be done, inasmuch as most men are careful to confine to their own breasts the manner in which they have disposed or mean to dispose of their property by will. The domestic peace

> and harmony of the testator's family might be very unhappily jeoparded if publicity were necessary to be given on such occasions."

The court further held that even in the case of a blind or illiterate person it was sufficient for the propounders of the will to show by evidence *satisfactory to the jury* that the testator knew the contents of the will.

3d Wash. C. C. R., 584.

The case of Doran *vs.* Mullen, 78 Ill., 342, is strongly in point. The validity of the will of Michael Mullen was the issue in the case. The will was written on a beer vessel in a beer saloon. It was dictated by a man named Wilder to the scrivener. Testator signed it by mark. It was attested by two subscribing witnesses, both of whom were present at the time it was executed. One of the witnesses saw the testator make his mark. The other did not, but saw the signature by mark after it was made. Judge Walker, in discussing the case, said:

> "From these facts, if they be true, there can be no possibility of doubt that the testator subsequently saw and signed the will, and the presumption is that he adopted it as his will. If so, then it can make no matter who dictated, who wrote it, or when it was drafted. It was next urged that inasmuch as the testator signed the will by his mark, and it was shown that Wilder dictated it, it was not entitled to probate until the propounder proved that its contents were read to him (testator). *The will is found with his signature to it, and the presumption is that he did not sign it without knowing its contents. Such is the usual presumption in reference to all instruments, and we are aware of no distinction between persons who can and who can not write.* Anciently, when but few persons could write, and all persons executed instruments by attaching their private seal, the law presumed, when the execution of the instrument was proved, that the maker took the

precaution to learn the contents before he executed it, and to avoid it he was required to prove that it was a forgery. He was not permitted to escape its binding effect by merely saying that he did not know its contents, although he might by saying that it was falsely read to him."

In the case of Walton *vs.* Kendick, 122 Mo., 504 (25 Law Rep., 707), the court said:

> "It is not the mere physical act of signing that the witnesses attest; it is that the instrument signed by the testator is his will. That fact they are warranted in attesting upon the declaration of the person whose name is signed to the instrument (he being of sound mind and of lawful age), that the instrument so signed is his last will and testament, although they may never have seen him subscribe his own name to it in proper person nor another subscribe his name thereto at his request and in his presence."

The controversy in the case of Scott *vs.* Hank, was over the probate of a will signed by mark, the validity of the will was attacked on the ground that the proponents did not prove it to have been read over to the decedent before it was signed, or that the testator was informed of its contents. The court held that both of these were implied in the execution of the will.

In the case of Nickerson *vs.* Buck, 12 Cush., 341, the testator signed by mark. His name was attached to his mark. This was supposed to have been done by one of the attesting witnesses, who was dead at the time of the trial. In discussing the case Judge Dewey said:

> "It is proved that this witness had deceased before the trial, but the death of an attesting witness, or of all the attesting witnesses, is not to defeat the validity of a will, *if, in fact, duly executed.* It changes the form of proof, and allows of the introduction of secondary evidence of the due attestation and execution of the will. Such attestation is

> then to be shown, as it would be in the case of deeds, by proof of the handwriting of the witness. That being shown, prima facie, it is to be taken to be true, and to have been put there for the purpose stated in connection with the signature. It is to be assumed, as regards that witness, that he duly attested the will in the presence of and at the request of the testator."

And further on in the opinion the court said:

> *"Hence, if the witness be requested by the testator to sign his name to the instrument as an attesting witness, and the testator declares to the witness that the signature to the will is his, that is abundantly sufficient."*

The statute in force in the State of Massachusetts at the time this case was decided was the same in its provisions as that which was in force in the District of Columbia at the time of the execution of the will under discussion.

The will in the case of Upchurch *vs.* Upchurch, 16 B. Munroe, 110, was written by testator's brother, who was a devisee thereunder, at his request, and testator's name was subscribed thereto. This paper writing was produced by the testator with his name already subscribed, to which he affixed his mark, and it was acknowledged by him in the presence of the attesting witnesses to be his last will and testament. The court held the will to be well executed. The statute of Kentucky was similar in phraseology to that of the statute in this jurisdiction.

In the case of Bailey's Heirs *vs.* Bailey's Executor, 35 Ala., 689, the only question presented for the consideration of the court was in permitting at the trial of the case in the lower court the proponent to prove by the witnesses to the will that Shaderack J. Bailey made his mark to the name of John S. Bailey, and allowing the will to be read to the jury as evidence. The court held that

it was the settled construction of the English statute, and of similar statutes in the United States, that the signature of the testator, or of the witnesses, by making a mark, was sufficient.

> "Nor is it necessary that the name of the testator should appear on the face of the will, or be attached to the mark which he makes as his signature. If an amanuensis inaccurately writes the wrong name in the body of the will, or to the mark of the testator, the execution is, nevertheless, good, as the statute has not exacted correctness in these particulars, its requisition being merely that the will be signed by the testator, not that it be signed in the name of the testator, and any signature intended to authenticate the instrument would be sufficient for this purpose."

In the case of Smith *vs.* Dolby, 4 Harr, 351, the issue was devasavit vel non. The propounders of the will proved by the attesting witnesses that the testator signed the will by his mark. He said he would like to hear it read, but he was not able to sit up. He said that the draftsman who prepared the will had written a will for him once before and it was not as he wanted it, but added "maybe this is." The codicil was read. His name was already written to it with a space for his mark. He made his mark and said it was his will. The court held it was not necessary to read the will over. There was sufficient evidence that the testator knew its contents and would be taken to know them unless the contrary appeared. The reading was only necessary where children were entirely disinherited, and even then only in case of doubtful capacity of the testator.

The case of Rosser *vs.* Franklin, 6 Grattan, 25, the will was signed by mark. The court held that it was not necessary that the subscribing witnesses to a will should see a testator sign, or that he should acknowledge to them the subscription of the name to be his signature,

or even that the instrument is his will. It is sufficient that he should acknowledge in their presence that the act was his, with a knowledge of the contents of the instrument, with the design that it should be the testamentary disposition of his property.

The civil law required that one who offered for probate the will of a blind person must show that the writing was read to the testator and that he adopted it as his last will and testament in the presence of the subscribing witnesses thereto. The common law made no such requirement.

> "It is never necessary either in the case of an illiterate testator, or of one whose vision is affected, that the actual reading of the will in the presence of the witnesses should be shown. It is sufficient if it should appear by satisfactory evidence that the testator, so unable to read his will, has been made acquainted with its contents by any proper means."
>
> Underhill on the Law of Wills, vol. 1, sec. 118.

> "All that the law requires is that the evidence and circumstances surrounding the execution of the will satisfactorily shows that the deceased knew the contents of the paper writing which is offered for probate as a will, though the amount of the evidence required, its nature, and the degree of proof will depend altogether *upon the circumstances of the case.*"
>
> Underhill on the Law of Wills, vol. 1, sec. 141.

The quotation from Schouler on Wills in appellant's brief is a general statement of the principles governing the execution of testamentary writings made by the blind or illiterate. These rules have no special application to the circumstances attending the execution of the testamentary writing in controversy. The author is not discussing the presumption which arises

from facts such as were shown in evidence in the case below. The same remarks apply to the quotation from Williams on Executors and Jarmin on Wills. All that the law requires, as shown by these authorities, is that the testator knew and approved of the contents of the instrument, and this may be shown by any competent evidence that the testator was acquainted with the contents of the testamentary writing.

The statute of Maryland relating to wills, in force here at the time the will under discussion was executed, and by which its validity must be determined, is as follows:

> "All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed, in the presence of the said testator, by three or more credible witnesses, or else they shall be utterly void and of none effect."

The provisions of this statute are identical with those of section 5 of the statute of 29th Chas. II, Chap. 3, known as the Statute of Frauds.

In construing this statute the courts of Westminster have uniformly held that the mark of a testator was a sufficient signing and that notwithstanding the testator could write.

1 Jar. on Wills, 5th Ed., sec. 78, and cases cited.

The statute itself makes no distinction between the signature by mark and testator's writing his own name. It expressly provides that the name of the testator may be signed to the will by another if done in his presence and by his express direction. To require that a will signed by mark shall be read to the testator in the presence of the subscribing witnesses at the time of its execution, is to graft into the statute an additional provision.

Ought this to be done? No reason is perceived why this should be required in the case of the execution of wills any more than in the execution of deeds. Reading prior to execution is not necessary to the validity of a conveyance signed by mark. The law presumes that a party so signing knows the contents of the instrument signed. Many titles to real estate stand upon that presumption. The same principle applies to contracts signed by mark. It has never been deemed necessary in suits either at law or in equity to show that a contract signed by mark was read before its execution. Knowledge of the contents of the instrument is presumed from the signing. The reasoning that would reverse this principle of construction as applied to wills could be urged with equal force against deeds and contracts signed by mark. By such construction titles would become unsettled and the great land marks of the law prostrated.

In the case of Wynham *vs.* Chetwynd, 1 J. Burr., 414, Lord Mansfield, speaking on the formalities to be observed by a testator in executing a will under the terms of the statute, said:

> "Suppose the subscribing witnesses honest. How little need they know? They do know the contents. They need not be together. They need not see the testator sign. *If he acknowledges his hand it is sufficient. They need not know it to be a will. If he delivers it as a deed it is sufficient.*"

In the case at bar there can be no doubt about the identity of the instrument in question. It was first seen in the hands of the testatrix herself. She brought it to the attesting witnesses, made her mark thereto in their presence, declared the paper to be her will, and took it away with her. It is submitted that under this evidence the court might well have instructed the jury to return a verdict in favor of the validity of the will on the first and second issues.

There were suspicious circumstances tending the execution of the will in the case of Day *vs.* Day, 3 N. J. Eq., 552. The testator was in extremis when he signed it. It was never in his possession. He was too feeble to have signed it if it had been. It was not read to him. He was asked if it should be read and he did not reply. He was told by his son, who drew the will, that it was a copy of the will executed by testator the day before. That will was modeled after a previous one with an increase in a legacy to a favorite daughter. The will last signed, which was offered for probate in this case, was less favorable to the daughter than the first had been. The first and second wills were burned up by the son on the day the last will was executed. Could the court do otherwise than deny the validity of the will with such antecedents?

The facts found by the court in the case of Lake *vs.* Rainey, 33 Barb., 49, so far as they are material to the question under discussion, were substantially as follows:

First, *the proponent of the will drew it. He was at the time of its execution, and from thence on to the time of the death of the testator, a member of his family, and held a fiduciary and confidential relation to him.*

Second, *the testator was, by reason of his bodily and mental infirmities, peculiarly liable to be imposed upon by any one capable of practising a fraud upon him.*

Third, there was no evidence that the will was read to him, *or that he knew its contents.*

Fourth, *testator's estate was valued at about $9,000, and $8,000 of this property went, by the terms of the will, to his wife, and the balance to the executors of the will, of whom Rainey, the draftsman, was one.* The case was not tried by a jury, but was before the court on surrogate's finding of facts, and the effect of the decision of the court was simply to have the factum of the will determined by the verdict of a jury.

The facts tending the execution of the will attempted

to be established in the case of Waterson *vs.* Waterson, 38 Tenn., 1, tended to show that the instrument was the result of fraud practiced upon the testatrix. She was illiterate, unable to read or write, was very old, and kept silent in regard to the will. No one knew of it except the witnesses, who lived at a distance from the family. The paper writing was not produced for some years after the testatrix's death, and more than 25 years after the alleged will had been executed. There was no evidence that the will was read to the testatrix before she signed it. It was written by the principal legatee thereunder. In discussing the case the court admitted the general rule to be that the free and voluntary execution of a paper by any one in his right mind would be sufficient, prima facie, to establish a knowledge of its contents, but held that that presumption was rebutted by circumstances of fraud attending the preparation and execution of the instrument, such as were shown in this case.

In the case of Worthington *vs.* Klemm, 144 Mass., 167, the testatrix, designing to make some changes in a previously executed will, gave instructions to her scrivener to make the changes, and bring the new will to her to be executed. The will was drafted according to her instructions, carried to her, and she signed it as her will in the presence of the attesting witnesses. The scrivener offered to read the will to her, but she declined, and requested him to keep it in his custody till her death. She never read the will, nor was it read to her. The court held the will was properly executed, and that the law did not require it to be read to the testatrix before its execution; that it was sufficient if the court were satisfied by competent evidence that the contents of the will were known to the person executing it.

The case of Burritt *vs.* Sellman, 16 Barb., 198, cited by appellant, has no application to the case at bar. The

Statute of Wills of the State of New York requires publication to be made by the testator to the attesting witnesses. No such publication was made in that case and the court held that for want of it the will was not entitled to recognition as decedent's last will and testament. In addition to this the evidence showed that the testator's faculties had become seriously impaired by the use of strong drink and opium; that she never read the alleged will or heard it read; had nothing to do with its preparation, and its contents were never shown to have been stated to her. Neither the English Statute of Frauds or the Statute of Wills in force in this jurisdiction required the testator to make publication of the will.

The maxim, "*Non quod dictum est, sed quod factum est, inspicitur,*" determines the question of the validity or non-validity of the execution of the will.

In re Will of David G. Porter, 20 D. C., 496.

Fraud, undue influence, or suspicious circumstances, in addition to illiteracy, is present in all those cases, neither of which is found in the present case. Appellants' brief was not printed in time to enable the appellees to review the authories cited by them.

It is freely admitted that the presumption that a party signing a will by mark, or otherwise, knows its contents, is not a conclusive presumption; but it is urged that such a presumption must prevail in the absence of all proof of fraud, undue influence or want of testamentary capacity attending the execution of the will. No attempt was made to show that the testatrix of the will under discussion was not capable of making a valid deed or contract at the date of making the will; on the contrary the evidence shows that she was a woman of energy, capacity, and intelligence for a person in her station of life; nor was any proof offered of fraud or

undue influence present or operative in the production of the will. There was an entire absence of all proof of this character, and these issues were actually, if not formally, withdrawn or abandoned during the trial of the case below. The ruling of the lower court was not based alone on the legal presumption arising from the fact of the testatrix making her mark to her will, and its being attested by the requisite number of witnesses in her presence. That of itself was sufficient in the absence of fraud or undue influence to establish the will. She declared to the attesting witnesses the paper writing to which she made her mark to be her will. She brought it with her to Mr. Parker's office for the purpose of having it executed. She had ample opportunity to know its contents and provisions. She was a person of sound mind at the date of the will. It was executed and attested in a solemn manner. The will itself is reasonable and sensible in its provisions and conforms to her probable natural inclinations, and certainly to her moral obligations. The jury were instructed by the court that unless they believed and found from *all* the evidence that the contents of the paper writing was known to testatrix, they must find against the will. It is obvious that the verdict of the jury ought not to be disturbed and a new trial allowed, unless some error was made by the trial court in excluding evidence which ought to have been submitted to the consideration of the jury. This brings us to appellant's second point.

II.

That the court erred in excluding evidence of the declarations made by the testatrix prior and subsequent to the date of her will as to how she intended to dispose of her property.

Adolph F. Lipphard, husband of decedent, testified that his wife talked to him often, prior to the date of the

will, as to what she intended to do with her property after her death. In his direct examination, he was asked the following question:

"What did she say?" (meaning with respect to the disposition of her property by will).

To this question objection was made by the caveatees, and the witness was not allowed to testify as to statements made by his wife touching the testamentary disposition of her real property prior to the date of the will.

Albert R. Humphrey, another witness, testified that he had a conversation with Mrs. Lipphard about two years before she died. He was asked the following questions:

"Did she tell you how she had left her property, or how she was going to leave it? A. Yes, sir.

"What did she say to you in reference to that matter?"

To which caveatees objected, and the court sustained the objection. Counsel for appellants stated that he desired to show by this witness that testatrix denied leaving the property as mentioned in the will.

William A. Lipphard, one of the caveatees, was asked a similar question, and, upon objection, the court made a like ruling, excluding the evidence. He said that he had a conversation with her in reference to her will just before her death; that she told him how she had left her property. Witness was then asked the following question:

"What did she say?"

The caveatees objected to the admission of the evidence, and the court sustained the objection (Rec., p. 30).

Mrs. Sarah Lipphard, the wife of one of the caveatees, testified that 8 or 10 weeks before decedent died she asked her if she had made a will, and then she was asked the following question:

"What did she say in reference to what was in her will and what she had done with her property, if anything?"

On objection by the caveatees the evidence was excluded. Counsel for caveators stated to the court that he desired to show by this witness that testatrix had denied to the witness that she had left her property as and in the manner stated in her will. Did the court err in excluding the testimony offered?

It is not apparent from the record for what purpose this evidence was offered. Appellant's brief, however, shows that the offer was made in support of the issue of want of mental capacity in the testatrix at the time she made her will. Under the decision in the Throckmorton *vs.* Holt case the declarations of the testatrix made before or after the execution of the will, not a part of the res gestæ, would have been admissible for no other purpose. Justice Peckham, in deciding this case, said in this connection:

> "Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations as indicative of the state of his affections are no more admissible than would be his unsworn declarations as to any other fact."

Throckmorton *vs.* Holt, 180 U. S., 573.

Further on in the opinion the learned justice said:

> "When such an issue (one of mental capacity) is made it is one which relates to a state of mind which was involuntary and over which the deceased

had not the control of the sane individual, and his declarations are admitted, *not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity.*"

Id., p. 574.

"It is apparent, therefore, that the declarations of the deceased are properly received upon the question of a state of mind whether mentally strong and capable, or weak and incapable, and that *from all the testimony, including his declarations,* his mental capacity can probably be determined with considerable accuracy."

In any case, before such declarations are admissible, there must be a foundation laid by other evidence tending to show want of testamentary capacity in the testator at the time of making his will.

Gibson *vs.* Gibson, 24 Mo., 227.
Throckmorton *vs.* Holt, supra, 575.

The case of Waterman et al. *vs.* Whitney et al., 11 N. Y., 157, is an interesting and well argued case on the subject under discussion. In deciding the case Judge Selden, speaking for the court, said:

"The offer was to prove declarations of the testator stating the contents of the will to be entirely different from what they were in fact, and these declarations *were offered in connection with other evidence bearing upon the competency of the testator at and before the execution of will,*"

and held the evidence admissible, *provided the declarations were not too remote in point of time from the execution of the will.*

In the case of Shailer *vs.* Bumstead, 99 Mass., 123, Judge Colt, discussing the point in question, said:

> " Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, *provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question.*"

One of the issues in this case was that testatrix was of unsound mind when she made the will in 1853; and there was evidence tending to show both bodily and mental infirmity at that date. The declarations offered in evidence were made in 1854.

No foundation was laid for the admission of this evidence. Not a syllable of testimony was adduced by appellants to show want of testamentary capacity at the date of the will. For aught the record shows she retained her mental powers up unto the time of her death, which took place five years and eight months after making her will. Appellants did not state what they expected to prove by decedent's husband. For aught it appears that he may have testified, if permitted, that the provisions of his wife's will were such as she told him they would be. The offer is too indefinite to be considered.

The evidence of William A. Lipphard is subject to like objection. Appellants' counsel failed to state what they expected to prove by this witness. This witness testified on cross-examination that he did not know his mother had made a will until after her death. In his direct examination he stated that she told him in a conversation had with her a week before she died how she had disposed of her property by her will (Rec., pp. 29 and 30).

His evidence, if admissible, is without probative force or value. Appellants offered to prove by Albert R. Humphrey that the testatrix, two years prior to her death, denied leaving her property as provided by her will. A similar offer was made with respect to the witness, Mrs. Sarah Lipphard, wife of Adolph Lipphard, with the exception that the alleged conversation with decedent took place with this witness eight or ten weeks before her death. Had the conversation of these last two witnesses been admissible under any circumstances, it took place at a period too remote to throw any light on the mental condition of the testatrix at the time the will was made. The conversation was irrelevant from any view. It had no tendency to throw any light on the mental condition of testatrix when the will was made. She was justified in law, if not in morals, in misleading her relatives as to the contents of her will.

In the case of Boylan *vs.* Meeker, 4 Dutcher (28 N. J. Law), 274, the court said:

> "He (meaning the testator) may, to secure his own peace and comfort during life, to relieve himself from unpleasant importunities of expectant heirs, conceal the nature of his testamentary dispositions, and make statements calculated and intended to deceive those with whom he is conversing. He has neither the sanctity of an oath nor the strong bond of self-interest to secure his adherence to the truth. The experience of everyone must satisfy him that an inquiry made of a testator, as to the contents of his will, rarely illicits the truth."

The argument in appellants' brief in support of the admission of this evidence is based on the theory that the declarations of a testator are admissible touching the disposition of his property by will, that it is only necessary to have an issue of want of mental capacity, and

that the door is then open for the admission of any statements made by a testator prior or subsequent to the execution of his will. It is respectfully submitted that this view is directly opposed to that of *this* court, as announced in the case of Throckmorton *vs.* Holt, supra, and is contrary both to authority and principle.

Respectfully submitted.

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